ARAH CIPTA SDN. BHD. & ANOR.

v.

KIAN KEE SAWMILLS (M) SDN. BHD. & ORS. (NO.1)

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: W-02-407-95]
2 SEPTEMBER 1996

CIVIL PROCEDURE: *Pleadings - Statement of claim - Striking out - Whether plain and obvious case - Whether reasonable causes made out - Whether containing serious questions to be tried - Rules of the High Court 1980, O. 18 r. 19(1)(a)*

The first respondent, the owner of certain parcels of land, had charged the said land to the second respondent by way of a third party charge. Subsequently, the first respondent executed a sale and purchase agreement with the first appellant, wherefore it undertook to sell the land to the latter. This agreement, however, was later supplemented with a supplementary agreement. It was not in dispute that by these agreements, the purchase of the said lands would be completed upon the tender by the first appellant of the so-called Additional Purchase Price amounting to RM100,000. This sum was be used to meet the release and dicharge of the caveat under Presentation No. 19961/92. The appellant subsequently gave notice to complete the purchase of the land. The respondents, however, opposed the completion of the sale agreements and, pleading non-compliance of certain conditions relating to the discharge of the third party borrowers, sought to terminate the agreements. The learned Judge allowed the respondents' application to strike out under O. 18 r. 19(1)(a) Rules of the High Court 1980. According to the learned Judge, the appellants' pleadings, as they stood, were unsustainable. This apart, the learned Judge also allowed the removal of the caveat lodged by the appellants. The appellants appealed. Before the learned appellate Judges the primary questions that arose were:

(i) Whether the appellants' statement of claim had shown a reasonable cause of action.

(ii) Whether the claim had raised serious questions to be tried, and hence, whether the caveat should remain.

Held:

Per Abu Mansor Ali JCA:

This was not such a plain and obvious case that the statement of claim shoud be set aside. The appellants have managed to make out, as pleaded, reasonable causes that needed ventilation at a proper trial. The learned Judge erred in permitting the matter to be determined without the benefit of the evidence before the Court.

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Pernyataan Tuntutan - Pembatalan - Samada satu kes yang jelas dan ketara - Samada kausa-kausa yang wajar dibuktikan - Samada mengandungi persoalan-persoalan serius untuk dibicarakan - Kaedah-kaedah Mahkamah Tinggi 1980 A. 18 k. 19(1)(a)*

Responden pertama, pemilik beberapa bidang tanah, telah menggadaikan tanah tersebut kepada responden kedua melalui gadaian pihak ketiga. Berikutan itu, responden pertama telah menyempurnakan perjanjian jualbeli dengan perayu pertama, di mana ianya telah mengakujanji untuk menjual tanah itu kepada pihak yang terkemudian. Perjanjian ini, walaubagaimanapun, telah kemudiannya ditambah dengan satu perjanjian tambahan. Adalah tidak dipertikaikan bahawa dengan perjanjian-perjanjian ini, pembelian tanah-tanah tersebut disempurnakan apabila perayu pertama membayar Harga Belian Tambahan berjumlah sebanyak RM100,000. Wang ini akan digunakan untuk menjelaskan pelepasan dan pembatalan kaveat di bawah perserahan No. 1961/92. Perayu berikutan itu telah memberikan notis untuk menyempurnakan pembelian tanah tersebut. Responden-responden, walaubagaimana pun, telah menentang penyempurnaan perjanjian-perjanjian jualan itu dan, sambil memplidkan ketidak-patuhan beberapa syarat-syarat berhubung dengan pelepasan peminjam-peminjam pihak ketiga, cuba untuk menamatkan perjanjian tersebut. Hakim yang bijaksana telah membenarkan permohonan responden-responden untuk membatalkan di bawah A 18 k. 19(1)(a) Kaedah-kaedah Mahkamah Tinggi 1980. Menurut Hakim yang bijaksana, pliding perayu, sebagaimana keadaannya, tidak dapat dipertahankan. Selain itu, Hakim yang bijaksana juga telah membenarkan pembatalan kaveat yang telah diserahsimpan oleh perayu. Perayu-perayu telah merayu. Di hadapan Hakim rayuan yang bijaksana persoalan-persoalan utama yang berbangkit adalah:

(i) Samada pernyataan tuntutan perayu-perayu telah menunjukkan satu kausa tindakan yang wajar.

(ii) Samada tuntutan telah membangkitkan persoalan-persoalan serius untuk dibicarakan, dan oleh itu, sama ada kaveat seharusnya kekal.

Diputuskan:
Oleh Abu Mansor Ali JCA:

Ini bukannya merupakan satu kes yang nyata dan jelas hinggakan pernyataan tuntutan seharusnya diketepikan. Sepertimana yang diplidkan, perayu-perayu telah berjaya menunjukkan kausa-kausa yang wajar yang perlu dibicarakan pada suatu perbicaraan yang sebenar. Hakim perbicaraan telah tersalah dalam membenarkan perkara itu untuk ditentukan tanpa keterangan dikemukakan di hadapan Mahkamah.

Legislation referred to:
Rules of the High Court, O. 18 r. 19(1)(a)

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-22-101-1995]

For the appellants - Logan Sabapathy (S. Nainappan with him); M/s. Logan Sabapathy & Co.
For the 1st, 3rd & 4th respondents - Gooi Soon Seng (Selvi Sandrasegaram and Y.K. Boo with him); M/s. Gooi & Co.
For the 2nd respondent - Ting Hing Peng; M/s. Amin, Tan & Co.
For the 5th & 6th respondents - Lim Kean Chye (B. Siva Subramaniam with him); M/s. Jeyaratnam & Chong

JUDGMENT

Abu Mansor Ali JCA:

In appeal No.W-02-407-95 (first appeal) the appellants were plaintiffs in the Court below and the respondents were defendants. The appellants were appealing against the decision of the learned Judge on 30 June 1995 allowing the defendants' application to set aside the plaintiffs' writ and statement of claim under O. 18 r. 19(1)(a) as disclosing no reasonable cause of action.

In appeal W-02-646-95 (the 2nd appeal) the appellants were also, appealing against the decision of the learned Judge for allowing the application of the 1st defendant for the removal of the caveat lodged by the appellants.

The appellants' Counsel preferred to first deal with the 1st appeal. After hearing arguments of both, we were unanimous that it was not such a plain and obvious case that the statement of claim should be set aside. We held the appellants have managed to make out, as pleaded, reasonable causes that needed ventilation at a proper trial. We, therefore, allowed the appeal and set aside the decision of the learned Judge and ordered that the case should go to trial.

Learned Counsel for the appellants, in his submission at the outset, took us through the facts of the case by going through the several paragraphs of the statement of claim as follows:

(a) In para. 6 of the statement of claim it was pleaded that the 1st respondent owned the said lands therein referred to. Paragraph 7 states that the said lands had been charged by way of third party charges in favour of the 2nd respondent who, despite the value of the said lands, was owed substantial sums of money from these third parties.

(b) Pursuant to para. 10 of the statement of claim the plaintiffs aver that in June 1994 the 1st appellant entered into the sale agreement for the purchase of the said lands from the 1st respondent. It was common ground that the 3rd respondent was a substantial shareholder of the 1st respondent and all parties concerned had consented to the sale of the said lands to the 1st appellant. It was also common ground that the said sale agreement was varied and supplemented by a supplementary agreement of even date.

(c) Para. 10(a) and 10(b)(ii) of the statement of claim stated that the sale agreement provided, in express terms, for essentially the 2nd respondent, as chargee, to give a confirmation to release the said lands for a sum not exceeding the purchase price in the sale agreement (called "the CCB Redemption Confirmation"). Paragraph 8(b) and (d) of the statement of claim, however, provided that there were no express terms in the sale agreement for the purchase price sum to extinguish the liability of the aforesaid third parties although the parties involved in the loans were themselves confident that the 1st appellant would assist.

(d) *Vide* para. 8(c) and para. 11 of the statement of claim, the plaintiffs stated that the sale agreement read in conjunction with the supplemental agreement provided for what is termed as additional purchase price, to meet the release and discharge of the caveat under Presentation No.19961/92. In para. 11(a)(i) of the statement of claim it was averred under this supplemental agreement, that the 1st appellant was to pay a sum of RM100,000 to account of the said additional purchase price and this said RM100,000 was to be paid upon the coming into being of the CCB Redemption Confirmation.

(e) In paras. 13 and 14 thereof the plaintiffs claimed steps were taken to secure the CCB Redemption Confirmation. This CCB Redemption Confirmation was, as contended by the appellants, had come into being.

(f) According to para. 18 of the statement of claim, the appellants gave notice to complete the purchase and to tender the said RM100,000 to account

of a completion date fixed for 13 December 1994. In paras. 19 and 20 of the statement of claim the plaintiffs contended that the 1st defendant's solicitors, however, sought to argue and raise the only ground that the sale agreement had lapsed or it was wrongly suggested that there was no CCB Redemption Confirmation as there was no discharge of the third party borrowers/ guarantors.

(g) *Vide* para. 15(b) and para. 19 of the statement of claim the plaintiffs alleged that it was clear that the 3rd respondent was interfering with the completion by the appellants of the sale agreement.

(h) In paras. 21, 22 and 23 of the statement of claim the plaintiffs disputed the purported termination of its sale agreement and gave notice of non-acceptance of such termination. Then lastly in para. 24 thereof the plaintiffs alleged they then discovered the subsequent arrangements involving the 4th, 5th and 6th respondents to the said lands. These subsequent arrangements dated back to October 1994, two (2) months before the alleged termination of the appellants sale agreement.

Appellant's Counsel further submitted that the sole ground relied on by all respondents to strike out the statement of claim was that the same averments did not disclose a reasonable cause of action solely within the meaning of O. 18 r. 19(1)(a) of the Rules of the High Court 1980. The appellant's Counsel further submitted that this position of going under r. 19(1)(a) of the Rules of the High Court 1980 was elected midstream by the respondents despite having earlier filed various affidavits on the matter.

The sum total of the appellants' Counsel's submission was that the learned Judge erred in law and fact in making the aforesaid decision and findings. It is the appellant's respectful submission that, in all the circumstances of the case, and upon a proper application of the tests attaching to applications to strike out a similar claims the learned High Court Judge ought not to have struck out the claim more so on the basis of holding that the said pleading itself was unsustainable. Learned Counsel added that the learned Judge erred in permitting the matter to be determined without the benefit of the evidence before the Court and that to be adduced at the trial of the matter.

With respect, we could not agree with the finding of the learned Judge when he held at pp. 26 to 37 of Appeal Record. In the said grounds, the learned High Court Judge supported his decision to strike out the appellants claim on essentially the following grounds:

(a) "I agree with all the defence Counsel that until the conditions are fulfilled, there can be no contract; there is no cause of action and the whole case collapses, not only against the 1st defendant but against all the defendants."

(b) "... that the pleadings of the plaintiffs disclose that the other two conditions have not been fulfilled ...", proceeded to hold that "... there is nothing in the pleadings to show that the [RM100,000] sum has been paid assuming that with any necessary amendment to the pleadings if need be, it can be shown there has been "CCB Redemption Confirmation". There is still nothing to show that the condition that the 2nd defendant must consent to the sale has been met with ... ."

(c) "... fail to see how the five others could have been dragged in as defendants when they were not even parties to the contract entered into between the 1st plaintiff and the 1st defendant. It has to be noted that no relief was prayed for against the 2nd, 3rd and 4th defendants on the sale agreement. A prayer was requested for the removal of caveats lodged against the land by the 5th and 6th defendants but no nexus is shown between these two defendants and the agreement entered into between the 1st plaintiff and the 1st defendant."

With respect, we found merit in the argument of the Counsel for the appellants and we upheld his submission that as far as the pleadings went the appellants were entitled to go to trial. We were satisfied that the several allegations of facts as stated above needed ventilation at a proper trial in order to determine this proceedings. By the same token we also held that this case should not have been summarily dismissed as stated, it is not such a plain and obvious case. We allow the appeal with cost and set aside the order of the learned Judge. The deposit was ordered to be refunded.

Reported by WA Sharif